SUPREME COURT OF THE UNITED STATES.

Nos. 26 and 32.—October Term, 1921.

John Horstmann Company, Appellant, 26 *vs.* The United States.		
		Appeals from the Court of Claims.
Natron Soda Company, Appellant, 32 *vs.* The United States.		

[November 21, 1921.]

Mr. Justice McKenna delivered the opinion of the Court.

Actions in the Court of Claims to recover respectively the sums of $35,000 and $170,000 alleged values of certain properties charged to have been taken and appropriated by the United States.

Both appellants are corporations, and are respectively owners of lands in Churchhill County, State of Nevada, surrounding and including lakes known as Little Soda Lake and Big Soda Lake. The Horstmann Company is owner of the former and the Natron Soda Company is owner of the latter.

In 1906 each appellant was manufacturing soda from the waters of the respective lakes and the controversy of the cases turns upon the condition of the lakes at that time, and their condition after an irrigation project was instituted by the Government, called the Truckee Carson Project.

The lakes are situated in an area known as the Carson Sink Valley, and in 1906 were dry bodies, and the source of soda supply to the respective appellants.

From prior to 1867 to 1906 the levels of the lakes had not varied more than 2 feet. In 1906 the United States Reclamation Service acting under the authority of acts of Congress constructed the Truckee Carson Project consisting of dams, canals, and other structures whereby through the usual means large quantities of surface waters theretofore confined to the watershed of the

Truckee River were in 1906 and during each year since then transported to the watershed of the Carson River and distributed to various and sundry tracts of land in the Carson River Valley for irrigation purposes.

Details of the project need not be given but with its advent the body of the ground water in the entire section covered by the project rose, and the volume of water in the lakes has continually increased, and the level of the lakes has risen about 19 vertical feet during the period of 1906 to 1916, in consequence of which the value of the properties of appellants have been destroyed, that of the Horstman Company being $9,000 and that of the Natron Company being $45,000, according to the findings of the Court of Claims.

There have been additions to the canal project and its ultimate development contemplates the reclamation of 206,000 acres of land. At present the canals of the project ramify an area of 100,000 acres.

No negligence on the part of the United States is alleged or proven.

The conclusion of the Court was that appellants were not entitled to recover, hence it dismissed the actions and rendered judgments against appellants for costs of printing the records. Motions for new trials were made and denied.

The question of the jurisdiction of the Court of Claims of the actions is intimated, if not urged, based on the allegation in the petition of the Horstman Company that owing to the porous condition of the soil in the canals and ditches and "the lack of proper lining in said canals and ditches, and owing to the way said canals and ditches were built and to the natural condition existing" the water flowed into the lake and seeped and percolated through the canals and ditches.*

The Government is cautious in its characterization of this allegation and says that it "apparently based the claim of the Horstmann Company upon the tort" and adds if the claim be so based, the Court of Claims had no jurisdiction "as the Government has never waived its immunity from suit in such cases."

*The petition of the Natron Soda Company directly alleges that the acts of the Government were legally done in the exercise of a constitutional and legal power.

We do not think, however, that the allegation was intended as an accusation of negligence but rather to forestall a defense, based on the character of the works that from them there could be no causal connection between the project of the Government and the rise of waters in the lakes. The Court of Claims besides explicitly found that there was no negligence.

Upon the merits, the contention of the Government is the absence of such causal connection between its works and the injury to the properties of appellants. It concedes, however, that the contention is a deduction from obscure findings, the Court not finding affirmatively that a causal connection did not exist. "Its decision was the Scotch verdict of 'not proved' ", to quote counsel.

Appellants oppose the Government's contention and deductions, oppose to them the difference in conditions before and after the execution of the canal project, and their reasoning seems to have the support of the methods that the world employs in the investigation of its phenomena and instances.

Post hoc, therefore, *propter hoc* may not be confidently asserted but there is a suggestion of effect and cause in it, of sequence, something more than unrelated occurrence. And of this there seems to be pertinent application in the present case. The transfer of water from one watershed to another—from the Truckee River watershed to the Carson River watershed—accompanied by an increase of the water in the lakes from a level not varied in 29 years more than 2 feet to 19 vertical feet would seem to demonstrate this as an effect of the canal project. And there can be no doubt of the adequacy of the cause even though, to quote from the findings, "percolating waters are hidden and invisible" and that "It does not appear from the evidence how they are governed or how they move underground." Their effects above ground, a rise of water in the lakes from 2 feet to 19 feet of water, are certainly visible and unmistakable. Indeed, the Court explicitly found that with the advent of the irrigation project the body of ground water in the entire section covered by the project rose.

However, we need not arbitrate the contentions but will assume with appellants that there was causal connection between the work of the Government and the rise of waters in the lakes, and the consequent destruction of the properties of appellants, but it does not follow that the Government is under obligation to pay therefor, as for the taking of the properties.

The Court of Claims, as we have seen, decided against such obligation and to its reasoning it would be difficult to add anything. The reasoning of the Court is attacked, however, by appellants, and *United States* v. *Lynah,* 188 U. S. 445, is adduced against it.

The instance of the cited case and a certain generality in its reasoning and basic principle gives plausible support to the contention. It is declared that the rule deducible from prior cases which are reviewed, is that the appropriation of property by the Government implies a contract to pay its value, and it is further declared that there need not be a physical taking, an absolute conversion of the property to the use of the public. It is clear from the authorities, it is said, that if by public works the value of the property of an individual is substantially destroyed, its value is taken within the scope of the Fifth Amendment. And it was decided that "the law will imply a promise to make the required compensation, where property to which the Government asserts no title is taken, pursuant to an Act of Congress, as private property to be applied for public use." *Tempel* v. *United States,* 248 U. S. 121, 129, 130.

This generality has had exception in subsequent cases. It is to be remembered that to bind the Government there must be implication of a contract to pay, but the circumstances may rebut that implication. In other words, what is done may be in the exercise of a right and the consequences only incidental, incurring no liability. *Bedford* v. *United States,* 192 U. S. 217; *Kansas* v. *Colorado,* 206 U. S. 46; *Tempel* v. *United States, supra.* And there is characterization of the *Lynah* case in *United States* v. *Cress,* 243 U. S. 316.

We think the cases at bar are within the latter decisions and it would border on the extreme to say that the Government intended a taking by that which no human knowledge could even predict. Any other conclusion would deter from useful enterprises on account of a dread of incurring unforeseen and immeasurable liability. This comment is of especial pertinence. The result of the Government's work to the properties of plaintiffs could not have been foreseen or foretold is a necessary deduction from the findings of the Court of Claims. The Court found that there is obscurity in the movement of percolating waters, and that there was no evidence to remove it in the present case, and necessarily there could not

have been foresight of their destination nor purpose to appropriate the properties.

In the Natron case the Company's predecessors in interest conveyed a right of way to the United States of certain lands of the Company, and prior to the conveyance, agreed with the United States that in consideration of the benefits to be derived from the construction of the works through the lands conveyed, that the United States might construct canals and ditches on and across the land, and further agreed "that in consideration of the premises, the first party hereby releases the second party from all claims for damages for entry, survey, or construction of said works."

The Government adduces the agreement and conveyance in opposition of the right of the Natron Soda Company to recover. The Company resists this effort. We, however, are not called upon to pass upon it. Independently of the agreement the Company's claim is to be rejected.

Judgments affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.